IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL No. 2724 16-MD-2724
THIS DOCUMENT RELATES TO: *ALL ACTIONS*	HON. CYNTHIA M. RUFE

DEFENDANTS' MEMORANDUM OF LAW REGARDING DEPOSITIONS IN SUPPORT OF DEFENDANTS' PROPOSED CASE MANAGEMENT ORDER SCHEDULING DISCOVERY, MOTIONS, AND OTHER PROCEEDINGS TO BRING THE BELLWETHER CASES TO TRIAL

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Pursuant to the Court's Order dated September 2, 2020 [MDL Doc. No. 1499], Defendants submit this memorandum of law in support of their motion requesting that the Court enter an order providing that fact witnesses may only be subjected to a single deposition in this MDL – whether deposed in the bellwether cases or otherwise – absent agreement of the parties or leave of Court following a showing of good cause.

PRELIMINARY STATEMENT

The Federal Rules permit only one deposition of a fact witness (absent leave of the Court) -- no exception to the rule is warranted here. The States and the Private Plaintiffs allege that Defendants engaged in "pervasive and industry-wide" conduct that they contend is "part of a larger, overarching understanding" to harm competition throughout the entire "generic pharmaceutical industry throughout the United States." Defendants vehemently deny these accusations. More importantly for present purposes, fact witnesses will be asked about their responsibilities and knowledge on subjects relevant not just to one case, but to the entire MDL.[1] Additional depositions of those witnesses inherently will be duplicative, wasteful of the Court's and the parties' time, open opportunities for Plaintiffs to fish for discovery, and give Plaintiffs multiple unfair bites at the apple.[2]

Plaintiffs originally argued that, during the bellwether deposition period, they need only depose fact witnesses as to those bellwether cases while retaining the right to re-depose those witnesses again on so-called non-bellwether issues. Plaintiffs appear to have now abandoned even that limiting principle in favor of an open-ended option to depose a witness again on any

[1] Because each case involves different products, markets, and defendants, there may be some witnesses unique to individual cases (who only need to be deposed for those cases).

[2] Even if the Court were to limit any second deposition to questions that were not, and could not have been, asked in a witness's first deposition, this MDL could become embroiled in innumerable disputes over that issue alone.

issue.[3] Both of Plaintiffs' approaches should be rejected, and the Court should enter an order providing that fact witnesses may only be subjected to a single deposition, unless the parties agree to, or the Court grants leave based on a showing of good cause for, a second deposition. Defendants respectfully submit that the proposed order is quite modest and will not deprive Plaintiffs of discovery, if they show good reason to depose a fact witness twice.

First, Plaintiffs' position is contrary to the Federal Rules of Civil Procedure and controlling case law. Rule 30(a)(2)(A)(ii) provides that a party must seek leave of Court to depose a fact witness where "the deponent has already been deposed in the case[.]" As courts in this circuit and elsewhere have recognized, permitting serial depositions is wasteful and provides the deposing party with an unfair strategic advantage. While the rule limits a party to one deposition per case, this rationale is even more applicable in MDLs where the purpose of coordinating dozens of cases filed in different jurisdictions by differently situated plaintiffs for pre-trial purposes is to promote efficiency and avoid redundant discovery.[4] For this reason, among others, courts presiding over MDLs regularly enter orders providing that fact witnesses may only be deposed once.

Second, employees do not work in artificial silos of facts relevant to the bellwether cases but not the non-bellwether cases. On the contrary, many anticipated fact witnesses' responsibilities encompassed multiple products or functions (several individuals have been sued or identified in multiple MDL complaints). Given the States' allegations in its bellwether case of an overarching, industry-wide conspiracy, and the fact that witnesses' responsibilities often are

[3] Proposed Schedule for End-Payer Plaintiffs and State Attorneys General Bellwether Cases, MDL Doc. No. 1497, Exhibit 1, p. 2, n.2 ("All deadlines in sections B, C, D and E and [sic] will not be possible, and will need to be adjusted, if Plaintiffs are limited to deposing bellwether witnesses only once."). *See also* Direct Purchaser Plaintiffs' Notice of Proposed Case Management Order, MDL Doc. No. 1496, Exhibit 1, p. 2, n.2 (same).

[4] And, as the Court knows, it has ordered discovery in this MDL to be MDL-wide, and not cabined in by the specific claims asserted against the particular defendants named in the various complaints.

not limited by product, every meaningful line of inquiry can and should be covered in a single deposition. Nothing of consequence should remain to question the witness a second time. In the unlikely event that there is a good reason to impose on a witness a second time, the parties can agree to it, or the Court - on a showing of good cause - can order it.

Third, permitting Plaintiffs to reserve the right to re-depose fact witnesses would be inconsistent with this Court's prior case management orders and Plaintiffs' own previous positions with respect to those orders. Specifically, PTO No. 105 provides that depositions in all cases will proceed at the same time. In prior submissions, Plaintiffs advocated against case management proposals that would lead to "multiple depositions of the same witnesses[.]"[5] Because it now suits their purposes, Plaintiffs are abandoning their prior position – a position they successfully advanced to obtain extremely broad discovery from Defendants. Plaintiffs' gamesmanship should be rejected.

BACKGROUND

The Court has ordered that three sets of complaints by Private Plaintiffs and one complaint by the States proceed as bellwethers (collectively, the "Bellwether Cases").[6] Pursuant to PTO No. 132 [MDL Doc. No. 1443], the parties engaged in negotiations with respect to a proposed schedule for the Bellwether Cases. Among the issues about which the parties were unable to reach agreement is whether fact witnesses who are deposed in the Bellwether Cases can be deposed again later in this MDL.

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[5] Plaintiffs' July 29, 2019 Letter Brief to Special Master Marion at 1-2.

[6] Pending before the Court is Certain Defendants' motion for clarification regarding the Court's July 14, 2020 memorandum and order on bellwether selection. (MDL Doc. No. 1479.) As set forth in that motion, Defendants read the Court's memorandum and order as expressly including Indirect Reseller Plaintiffs' ("IRPs") in the definition of "Private Plaintiffs" whose clobetasol, clomipramine, and pravastatin cases would proceed as bellwethers along with identical complaints by Direct Purchaser Plaintiffs ("DPPs") and End Purchaser Plaintiffs ("EPPs"). The Private Plaintiffs' class action complaints as to clobetasol, clomipramine and pravastatin are referred to herein as the "Individual Product Bellwether Cases" and the State Plaintiffs' Teva-centric Amended Complaint filed November 1, 2019 as the "Teva AG Bellwether Case."

ARGUMENT

A. The Federal Rules And Applicable Case Law Permit Only One Deposition

Defendants' position that a fact witness should only be deposed once is nothing more than a restatement of the law and common MDL practice. The Federal Rules of Civil Procedure provide that, absent leave of Court, an individual or corporation may only be deposed once. Fed. R. Civ. P. 30(a)(2)(A)(ii) (party must seek leave to depose witness where "the deponent has already been deposed in the case"); *see also* Fed. R. Civ. P. 26(b)(2)(C)(i) (discouraging "unreasonably cumulative or duplicative" discovery); *Melhorn v. N.J. Transit Rail Operations, Inc.*, 203 F.R.D. 176, 180 (E.D. Pa. 2001) ("Absent some showing of need or good reason for doing so, a deponent should not be required to appear for a second deposition."); *St. Fleur v. City of Linden, N.J.*, No. 15-cv-01464 (SRC)(CLW), 2017 WL 3448106, at *4 (D.N.J. Aug. 10, 2017) (same). This sensible rule exists to promote efficient litigation and prevent gamesmanship:

> The policy against permitting a second deposition of an already-deposed deponent is equally applicable to depositions of individuals and organizations…. In both cases, each new deposition requires the deponent to spend time preparing for the deposition, traveling to the deposition, and providing testimony. In addition, allowing for serial depositions, whether of an individual or organization, provides the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last.

State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc., 254 F.R.D. 227, 235 (E.D. Pa. 2008).

Multiple depositions of the same fact witness will lead to duplication and inefficiencies inconsistent with the very purpose of this MDL: to "serve the convenience of [the] parties and witnesses and promote the just and efficient conduct of this litigation." *See* JPML Order, MDL Doc. No. 1 at 2; *see also* 28 U.S.C. § 1407(a) (MDL transfers done "for the convenience of the parties *and witnesses* and will promote the just and efficient conduct of such actions") (emphasis

added). For that reason, MDL courts routinely prohibit a second bite at the apple, absent leave of the court. *See In re Sulfuric Acid Antitrust Litig.*, 230 F.R.D. 527, 531 (N.D. Ill. 2005) ("Because the plaintiffs issued their notice for a second deposition of Mr. Ross without first seeking leave of the court, the notice was invalid under [Fed. R. Civ. P. 30(a)(2)(A)(ii)])."); *In re C.R. Bard, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, MDL No. 2187, 2013 WL 6044415, at *1 (S.D. W. Va. Nov. 13, 2013) ("Federal Rule of Civil Procedure 30(a)(2) requires a party to obtain leave of court to take the deposition of a witness that has already been deposed in the case."). MDL courts routinely enter case management orders that limit parties to a single deposition of any one witness. *See, e.g., In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, ECF No. 643 at 4 (N.D. Ohio Jun. 20, 2018) ("Depositions taken in this MDL pursuant to this Order shall not be retaken in this MDL without further order of the court upon good cause shown or an agreement of the parties.") (**Ex. A**); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420-YGR DMR, ECF No. 905 (N.D. Cal. Oct. 19, 2015) (same) (**Ex. B**); *In re Avaulta Pelvic Support Sys. Prods. Liab. Litig.*, MDL No. 2187, ECF No. 55 (S.D. W. Va. June 7, 2011) (same) (**Ex. C**); *In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, MDL No. 1699, ECF No. 169 (N.D. Cal. Feb. 7, 2006) (same) (**Ex. D**); *In re Sulfuric Acid Antitrust Litig.*, MDL No. 1536, ECF No. 218 (N.D. Ill. Aug. 19, 2005) (same) (**Ex. E**); *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, ECF No. 70 (E.D.N.Y. Aug. 18, 2004) (same) (**Ex. F**).[7]

Nothing in the Bellwether Cases warrants upending well-established laws and MDL practices against burdening a fact witness with multiple depositions. The sheer breadth of the overarching conspiracy allegations in the Teva AG Bellwether Case demonstrates that every subject relevant to this MDL may potentially be covered in a Teva AG Bellwether Case

[7] Copies of these orders are attached as exhibits herewith.

deposition. In the opening paragraphs of their complaint, the States allege the existence of an overarching conspiracy encompassing both price-fixing and market allocation that "permeated every segment" of the "generic pharmaceutical industry." Teva Compl. ¶ 1. [8]

According to the States, each Defendant allegedly harmed competition "across the generic drug industry" and "throughout the United States" for years. *Id.* at ¶¶ 5-6. The actions were purportedly "widespread" and designed not just for a handful of products, but allegedly extended to each Defendant's entire "product portfolios," including existing and future products they may or may not sell, thereby bringing into discovery well over a hundred pharmaceuticals. *Id.* at ¶¶ 16, 18 and 150. The allegations contained in the States' two non-bellwether complaints, as well as the overarching conspiracy complaints of the Private Plaintiffs, are similar with the Teva AG Bellwether Case.[9]

As a practical matter, a corporate employee who might be deposed in the Bellwether Cases likely will have responsibilities touching multiple MDL cases. He or she cannot put blinders on his/her knowledge about the Bellwether Cases vis-à-vis the non-Bellwether Cases. The complaint in the Teva AG Bellwether Case is replete with allegations of significant fact witnesses simultaneously involved in pricing and sales across scores of Bellwether Cases products, non-Bellwether Cases products and even non-MDL products. *See*, *e.g.*, Teva Complaint ¶¶ 602, 608, 626, 674, 745, 990.

[8] No. 2:19-cv-02407-CMR, ECF No. 106 (D. Conn. Nov. 1, 2019).

[9] See, e.g., State AGs' Heritage Complaint, ¶¶ 11-12 (referring to a conduct that "is pervasive and industry-wide" and noting that "the schemes identified herein are part of a larger, overarching understanding about how generic manufacturers fix prices and allocate markets to suppress competition" "across their respective broad product portfolios") (E.D. Pa. June 15, 2018); State AGs' Dermatology Complaint, ¶ 5 (referring to an "understanding [that] has permeated every segment of the industry") (D. Conn. June 10, 2020); DPPs' Teva-centric complaint, ¶ 11 (referring to an "overarching scheme" involving "far more than 100 generic drugs") (E.D. Pa. Feb. 7, 2020); EPPs' Heritage-centric Complaint, ¶ 2 (referring to "an overarching conspiracy, the purpose of which was to raise prices and minimize competition in the generic drug industry for numerous generic drugs") (E.D. Pa. Apr. 1, 2019).

The way in which Plaintiffs have structured their allegations exacerbates the problems of serial depositions. The one-on-one communications among competitors that Plaintiffs allege typically involved multiple products. *See*, *e.g.*, Teva Complaint ¶¶ 609, 776, 863. For example, Plaintiffs allege that inappropriate communications relating to numerous products occurred at the Annual Meeting of the National Association of Chain Drug Stores ("NACDS") from April 20-23, 2013. This event is featured in complaint allegations for both Bellwether Cases and multiple non-Bellwether Cases.[10] Consider also a drug like tizanidine, which is in the Teva AG Bellwether Case and some non-Bellwether Cases. Private Plaintiffs could depose a pricing executive about tizanidine in the Teva AG Bellwether Case, and having studied the first transcript, depose him/her again in their non-Bellwether Cases.

As these examples illustrate, it would be wasteful and burdensome to expect a fact witness to answer questions strictly limited to the Bellwether Cases, only to have to answer the same questions again in any subsequent deposition regarding non-Bellwether Cases. To date, Plaintiffs have not articulated any issues related to their allegations in non-Bellwether Cases that would justify serial depositions.

Making matters worse, not only do Plaintiffs seek the right to re-depose a witness in non-Bellwether Cases, they will not even commit that all Plaintiffs – whether they are in the Bellwether Cases or not – must participate in depositions during the bellwether phase. Thus, under Plaintiffs' proposal, the IRPs and Kroger Plaintiffs, for example, would not be required to participate in those depositions and would reserve the right to depose again a witness who was

[10] *See* DPPs' Clobetasol Complaint, ¶ 119 (E.D. Pa. Aug. 15, 2017); DPPs' Clomipramine Complaint, ¶ 104 (E.D. Pa. Aug. 15, 2017); DPPs' Pravastatin Complaint, ¶ 117 (E.D. Pa. Aug. 15, 2017); EPPs' Clobetasol Complaint, ¶ 135 (E.D. Pa. Apr. 1, 2019); EPPs' Clomipramine Complaint, ¶ 119 (E.D. Pa. Apr. 1, 2019); EPPs' Pravastatin Complaint, ¶ 153 (E.D. Pa. Apr. 1, 2019); EPPs' Heritage-centric Complaint, Exhibit 1 (E.D. Pa. Apr. 1, 2019); and IRPs' Divalproex Complaint, ¶ 92 (E.D. Pa. Apr. 1, 2019).

deposed during the bellwether phase, even though these non-Bellwether Cases plaintiffs have asserted claims and included products similar (and as to the IRPs, *identical*)to those that are alleged in the Bellwether Cases.[11] The non-Bellwether Cases plaintiffs (and indeed, all of the plaintiffs) will be able to review what was asked and answered of a witness in the first round of depositions, explore opportunities to fish for more discovery based on the answers, and then allow for more questioning of the same witness on the same subject matter in subsequent depositions. In other words, the non-Bellwether Cases plaintiffs (and all the other plaintiffs) would impermissibly gain "an unfair strategic advantage, offering [them] multiple bites at the apple, each time with better information than the last." *State Farm*, 254 F.R.D. at 235. That would be an unjust and unfair result, particularly in the context of an MDL where the entire purpose of consolidating the cases is to promote efficiency and avoid duplication.

B. Permitting Fact Witnesses To Be Deposed Multiple Times Would Be Inconsistent With This Court's Case Management Orders And Plaintiffs' Prior Positions

In attempting to retain the ability to successively depose the same fact witness, Plaintiffs have abandoned a principle that they have consistently championed, and which was embodied in PTO 105 – *i.e.,* that discovery, including depositions, should proceed and conclude for "*all cases"* at the same time. *See* PTO No. 105 ¶ 8; Plaintiffs' Proposed Case Management Order and Discovery Schedule, July 29, 2019, ¶ 7. Indeed, in the past, Plaintiffs stated that they too wanted to avoid "multiple depositions of the same witnesses[.]" Plaintiffs' July 29, 2019 Letter Brief to Special Master Marion at 1-2 (challenging Defendants proposal because it would "result in redundancy of discovery efforts (e.g., multiple time-consuming searches in the same files for

[11] EPPs and State Plaintiffs understand the incongruity of allowing for serial depositions for Plaintiffs who are not in the Bellwether Cases. During negotiations with Defendants about a joint scheduling proposal, EPPs and State Plaintiffs agreed that any Plaintiff who has claims overlapping with the claims encompassed in the Bellwether Cases must examine any fact witness already being deposed in the Bellwether Cases during the same deposition.

responsive documents, *multiple depositions of the same witnesses*) that will compound costs and delay, and will thwart the goals of judicial economy and efficiency that led to the JPML's creation of this MDL in the first place") (emphasis added).[12] Yet Plaintiffs now seem to have buyer's remorse, asking for multiple bites at the apple when they previously touted the efficiencies of a case management structure tied to single depositions. Plaintiffs should not be allowed to turn back. Judicial economy and fairness to Defendants, as dictated by the Federal Rules and common MDL practices, limit Plaintiffs to one deposition of any fact witness.

C. Whether Limiting The Parties To A Single Deposition Of Each Fact Witness Will Delay Resolution Of The Bellwether Cases Is Not Grounds To Deviate From The Federal Rules Or Controlling Case Law

Despite the plain language of Federal Rule of Civil Procedure 30 and controlling case law, Plaintiffs claim that they should not be prohibited from serially deposing fact witnesses because "if such a limitation is imposed, all proposed deadlines [in their bellwether schedule] must be extended by at least 4-6 months, and possibly more."[13] MDL Doc. No. 1497 at 2. But this is a problem of Plaintiffs' own making. Plaintiffs provide no explanation why limiting fact witnesses to a single deposition would require an extension of their proposed bellwether schedules. Simply because the parties would be required to ask questions regarding all issues and all products in one deposition should not extend the schedule. Rather, parties with similar interests should coordinate their efforts to allocate time and avoid redundant questioning, as is done in countless other complex litigation matters. Plaintiffs should propose realistic schedules

[12] Special Master Marion adopted Plaintiffs' concerns in his August 16, 2019 Report and Recommendation, noting that "[t]he phased approach proposed by the Defendants may risk redundancy, *multiple depositions of witnesses*, and confusion" (at 4 ¶ 2) (emphasis added).

[13] *See also* MDL Doc. No. 1497 at 6 n.2 ("All deadlines in [certain sections of the proposed schedule] will not be possible, and will need to be adjusted, if Plaintiffs are limited to deposing bellwether witnesses only once"); MDL Doc. No. 1496-1 at 2 n.2 (same).

that permit the completion of necessary discovery – if more time is necessary for depositions to be taken in the manner required by the Federal Rules, Plaintiffs should have included that time in their proposed schedule (Defendants are not necessarily opposed to such a proposal).[14]

CONCLUSION

For the reasons set forth above, Defendants respectfully submit that the Court should enter an order providing that fact witnesses may only be deposed once in this MDL absent either (1) an agreement of the parties, or (2) leave of Court following a showing of good cause.

[14] To the extent Plaintiffs argue that they should be entitled to re-depose witnesses because Defendants have not produced documents in response to Plaintiffs' Second Set of Requests for Production of Documents to Defendants, dated July 10, 2020 (the "July 2020 RFPs"), even if assumed true, is an issue of Plaintiffs' own making. The July 2020 RFPs are materially similar to Plaintiffs' initial document requests, which (with limited exceptions) only expands the definition of "Drugs at Issue" to include products added to the MDL after September 2019. Plaintiffs, however, have known or should have known about all of those products months before they served this discovery. This is likely true even with respect to those products added to the MDL through the State Plaintiffs' June 2020 complaint. The State Plaintiffs represented to the Court that they would be filing that complaint more than six months before it was filed, and they surely knew many (if not all) of the products that would be added to the MDL. Yet Plaintiffs continued to negotiate with Defendants and otherwise engage in document discovery without regard to any of the post-September 2019 products. Moreover, given that Plaintiffs have proposed a fact discovery period ending in the spring of 2022, there is every reason to believe that Defendants will have produced documents responsive to the July 2020 RFPs in time for any such documents to be incorporated into fact depositions.

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CERTIFICATE OF SERVICE

I, Chul Pak, hereby certify that on September 9, 2020 I caused a true and correct copy of the foregoing document to be served upon the parties of record via CM/ECF.

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